No. 14629

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellant,
vs.
CLARA STINTZI, Guardian ad Litem for Gerald Stintzi, a minor,
Appellee.

No. 14629

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

HON. SAMUEL M. DRIVER, *Judge*

APPELLEE'S BRIEF

R. MAX ETTER,
706 Spokane & Eastern Building,
Sokane, Washington
JOHN D. MACGILLIVRAY,
507 Fidelity Building,
Spokane, Washington
JOHN T. DAY,
1302 Rochefontaine,
Richland, Washington
Attorneys for Appellee.

KERSHAW'S, INC.

INDEX

	Page
JURISDICTION	1
RE-STATEMENT OF THE CASE	2
ARGUMENT	12
Answer to Specifications of Error I, II & III	12
Answer to Specifications of Error IV & V	32
Answer to Specification of Error VI	34
Answer to Specification of Error VII	36
Answer to Specification of Error VIII	40
Answer to Specification of Error IX	42
CONCLUSION	45

TABLE OF CASES

Page

Arnold v. U. S. Gypsum Co.,
44 Wash. 2d 412; 267 Pac. 2d 689 39
Biondini v. American Ship Corp.,
185 Pac. 2d 94 (California) 26
Boucher v. American Bridge Co.,
213 Pac. 2d, 537 (California) 26
Callaway v. Pickard, 23 S. E. 2d 564 33
Canham v. R. I. Co., 85 Atl. 1050, 1055 33
Chicago & Erie Ry. Co. v. Shaw, 116 F. 621 28
Chicago I. & L. R. Co. v. Pritchard,
168 Ind. 398; 79 N. E. 508 24
Christiansen v. Weyerhaeuser Timber Co.,
16 Wash. 2d, 424; 133 Pac. 2d, 797 15
Clark v. N. P. Ry., 69 Pac. 636 39
Christensen v. Gray's Harbor County,
34 Wash. 2d 878; 210 Pac. 2d, 693 39
Davis v. Falconer, 292 Pac. 424 36
Deffland v. Spokane Cement Co.,
26 Wash. 2d, 891; 176 Pac. 2d, 311 15
Deister v. Atchison T. & S. F. Ry. Co.,
162 Pac. 282 33
Dotson v. Haddock, 278 Pac. 2d, 338 14
Dingman v. A. F. Mattock Co., 104 Pac. 2d 26 14
Ellington v. Ricks, 178 N. C. 686; 102 S. E. 510 26
Franey v. Union Stockyard & Transit Co.,
235 Ill. 522; 85 N. E. 750 26
Florida Power and Light Co. v. Robinson
68 So. 2d 406 43
Garner v. Pacific Coast Coal Co.,
3 Wash. 2d, 143; 100 Pac. 2d, 32 15
Gastine v. Ewing, 150 Pac. 2d 266 (California) 26
Great Northern v. Thompson,
199 F. 395; 9th Circuit 20, 22, 23, 28, 38
Green v. Denver, 111 Colo. 390; 142 Pac. 2d 277 45
Grove v. D'Allessandro,
38 Wash. 2d 421; 235 Pac. 2d 826 ..... 14, 26

TABLE OF CASES (Cont'd)

Page

Hansen v. Lehigh Valley Ry. Co., 120 F. 2d, 498.... 16
Harris v. Snider, 223 Ala. 94; 134 S. 807..... 45
Holm v. Inv. & Securities Co., 195 Wash. 52..... 14
Hurley v. Connecticut Co., 172 Atl. 86..... 33
Imler v. Northern Pacific Ry. Co.,
89 Wash. 527; 154 Pac. 1086 21
Kauffman v. Meyberg, 140 Pac. 2d, 21;
(California) 45
Kieffer v. Blue Seal Chemical Co.,
196 F. 2d, 614; 3rd Circuit..... 43
Lee and Eastes v. Continental Carriers,
44 Wash. 2d, 28; 265 Pac. 2nd 257..... 36
Leenders v. California Hawaiian etc. Corp.,
139 Pac. 2d, 987 (California)..... 14
Louisville & N. R. Co. v. Payne's Admr.,
197 S. W. 928 (Kentucky)..... 29
McNamara v. Hall. 38 Wash. 2d, 864;
233 Pac. 2d, 852..... 15
Morris v. Granato, et al, 133 Conn. 295; 50
A. 2d 416 26
Mitchell v. Barton, 126 Wash. 232; 217 Pac. 993.... 14
Myer v. West Coast Fast Freight,
42 Wash. 2d 524; 256 Pac. 2d 840..... 36
Neal v. Curtis & Co. Mfg. Co., et al,
41 S. W. 928 (Kentucky) 28
Palmer v. Long Beach, 189 Pac. 2d, 62..... 33
Pauckner v. Wakem, 83 N. E. 202 (Illinois)..... 26
Pollard v. Roberson, 6 S. E. 2d 203..... 33
Robbins v. Greene, 43 Wash. 2d 315, 261
Pac. 2d 83 36
Sack v. Sickman, 23 N. W. 2d 706 (Nebraska)..... 45
Scharf v. Spokane and Inland Empire Railroad
Co., 92 Wash. 561; 159 Pac. 797..... 39
Sim v. Weeks, 45 Pac. 2d 350 (California)..... 45
Silvestro v. Walz, 51 N. E. 2d, 629 (Indiana).... 12, 26

TABLE OF CASES (Cont'd)

Page

Southern Pacific v. Guthrie, 180 Fed. 2d 398 43
Spots v. Wabash West. Ry. Co., 20 S. W. 190 (Missouri) 28
Southern Ry. Co. v. Wilkins, 178 N. E. 454 (Indiana) 30
Sevener v. Northwest Tractor and Equipment Co., 41 Wash. 2d 1; 247 Pac. 2d 237 39
State v. Cunningham, 173 Or. 25; 144 Pac. 2d 303 .. 45
State v. Ebelsheiser, 242 Iowa 49; 43 N. W. 2d 706; 19 A. L. R. 2d 865 (1950) 44
State v. Long, 195 Or. 81; 244 Pac. 2d 1033 45
Sullivan v. City and County of San Francisco (No. 401150 Superior Court, San Francisco) 44
Swak v. Department of Labor & Industries, 40 Wash. 2d 51, 240 Pac. 2d 560 39
Stevens v. Boston Elevated, 69 N. E. 338 33
The Joseph B. Thomas, 86 F. 658; 9th Circuit 31
United States v. Luehr, 208 F. 2d 138; 9th Circuit .. 43
Wesley v. State, 26 S. 2d, 413 (Alabama) 45

TEXTS

Modern Trials—Belli 45
44 *Am. Jur.* Sec. 426, p. 644 14
44 *Am. Jur.* Sec. 429, pp. 648-650 inclu. 14
44 *Am. Jur.* Sec. 438, p. 633 23
44 *Am. Jur.* Sec. 438, p. 663 26
2 *Wigmore, Evidence,* 3rd Ed. Sec. 282 33

PERIODICALS AND REVIEWS

18 Mountain Law Review (April 1946) Pages 212 and 213 45
Medical Trial Technique Quarterly, Dec. 1954 (Averbach) 45

No. 14629

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellant,
vs.
CLARA STINTZI, Guardian ad Litem for Gerald Stintzi, a minor,
Appellee.

No. 14629

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

HON. SAMUEL M. DRIVER, *Judge*

APPELLEE'S BRIEF

JURISDICTION

The appellee accepts the jurisdictional statement of the appellant.

RESTATEMENT OF THE CASE

Appellant acknowledges the rule that upon appeal involving the legal sufficiency of the evidence, the facts must be viewed in the light of the evidence and inferences therefrom most favorable to the appellee (App. Br. 4). Appellant then proceeds to disregard the rule by stating the evidence and drawing inferences therefrom in the light most favorable to itself. For that reason a restatement of the evidence is necessary.

The accident in question occurred July 17, 1952 at approximately 8:20 p.m. on track 13 immediately north of the icing dock on appellants freight yard premises at Yardley, Washington (Tr. 374, 828). Appellants freight yard runs east and west, is one mile in length and 6 to 8 city block in width (Exs. 1, 37, Tr. 525, 664). The yard contained some 55 tracks running generally east and west, sloping to the center of the yard where is located the icing dock (Exs. 1, 37, Tr. 763-764). South of the icing dock is the ice plant where ice is manufactured and which is connected to the icing dock by an underground tunnel (Exs. 1, 2, 3, Tr. 67-68). The yardmaster's office is 2050 feet west of the icing dock (Ex. 1, Tr. 71). Track 13 is immediately north of the icing dock, the south rail of 13 being within 4 to 5 feet of the north side of the dock. When freight cars are upon track 13, the south side of the cars are within 3 feet of the north side of the icing dock (Tr. 546, Exs. 10, 16). Track

12 is immediately south of and equidistant from the icing dock (Ex. 1). The top of the icing dock (icing platform) is 15 feet above ground (Tr. 70), and 1260 feet in length (Tr. 540, 541). The icing platform is equipped with overhead electric lights on light poles at 40 foot intervals on both the north and south sides (Tr. 541, Exs. 9, 20, 21, 43).

Icing of all refrigerator cars dispatched from appellant's freight yard is handled by the Addison-Miller Company as an independent contractor under an agreement executed in 1936 (Ex. 42, Tr. 674). Addison-Miller Company manufactures ice at the ice plant (Tr. 59). From there it is conveyed in 400 pound blocks on a conveyor belt running through the underground tunnel to the icing dock, then up through the icing dock to the icing platform (Tr. 67, 68, 116, 122, 709, Exs. 2, 3). During icing operations these blocks of ice are removed from the conveyor belt on top the icing platform, broken up, placed in the refrigerator cars on tracks 12 and 13 and then are salted down (Tr. 122, 124, 272).

Immediately below the conveyor belt where it enters the icing dock is a large slush pit or sump in which is collected slush and cracked ice falling from the conveyor belt as it starts upward to the icing platform (Ex. 5). When the slush pit is cleaned out the slush ice is carried in buckets across track 13 to the north to "a common dumping ground" between tracks 13 and 14 (Tr. 201, 202, 714, 715, 547, 788, Exs. 11

and 12). The slush pit was usually cleaned out during the Addison-Miller day shift but had been cleaned out at night on 2 or 3 prior occasions (Tr. 705, 706). For at least 10 years it had been the accepted practice of Addison-Miller employees to dump this slush ice, salt sacks and other debris on the dumping ground north of track 13 (Tr. 714, 715, 744, 745). Although appellant's employees could not recall having seen slush ice, salt sacks or other debris on the dumping ground over this 10 year period (Tr. 789, 790, 547, 548), it is admitted that the presence of this material on the dumping ground could only mean that it was carried there across track 13 by Addison-Miller employees (Tr. 790).

Appellant had a direct and vital interest in the icing operations of Addison-Miller Company (Tr. 539, 540). Assistant ice foremen employed by the Northern Pacific were usually present on the icing dock during icing operations, exercising some degree of control and supervision over the icing operations of Addison-Miller (Tr. 539, 589, 590, 610).

Salt required in the icing operations was delivered by appellant in freight cars to a point on track 13 opposite the salt pit on the north side of the icing dock (Tr. 163, 165, Ex. 16). The 80 pound paper salt sacks (Tr. 321) were unloaded by Addison-Miller employees from the salt cars by means of a 2-wheel hand truck across a platform extending from the floor of

the freight car to the floor of the salt pit (Tr. 163, 165, 321).

Addison-Miller Company ran three shifts in its icing operations (Tr. 107, 108). During the summer many of the Addison-Miller employees were young high school boys (Tr. 173, 306, 666, 712). An arrangement existed as between Northern Pacific and Addison-Miller officials that a blue light would be exhibited at the west end of the icing dock when work was in progress during hours of darkness (Tr. 410, 766). The minor plaintiff and other Addison-Miller employees were never advised of this arrangement (Tr. 745, 200, 246, 338). To the knowledge of L. W. Phophet, switching foreman of the appellant, this blue light rule or arrangement was often disregarded by Addison-Miller foremen (Tr. 426, 427). Northern Pacific employees had been instructed that when there was any likelihood that men were working on or about cars at the icing dock, the blue light rule or arrangement should not be depended upon to give the men the protection (Tr. 824, 825). Prophet had frequently seen Addison-Miller employees working at night "on the Addison-Miller dock, on top of cars, on tracks 12 and 13 beside the dock, without the blue light illuminated" (Tr. 396).

A sure indication as to whether Addison-Miller employees were working on or about the icing dock and tracks 12 and 13 during hours of darkness was the illumination of the overhead lights on the icing plat-

form. Prophet, switching foreman, James Crump, yardmaster, and Ralph Swanson, ice foreman of appellant, all frankly admitted that the overhead white lights on the icing platform were provided for Addison-Miller employees to work by at night (Tr. 392, 769) and that when the white lights were illuminated at night such indicated in all probability (Tr. 394, 395) and almost to a certainty (Tr. 418, 419) that Addison-Miller employees were working on and around the icing dock (Tr. 697, 790-792).

Appellee Gerald Stintzi, 17 years of age, had been employed by Addison-Miller Company five days prior to July 17, 1952 (Tr. 105, 107). He had worked for Addison-Miller three weeks during the previous summer when but 16 years of age (Tr. 173). During the five days prior to July 17, 1952, Stintzi had worked the swing shift from 3 p.m. to 11 p.m. icing refrigerator cars and unloading salt from the salt cars to the salt pit (Tr. 106, 108). On July 17, 1952, Stintzi reported for work at the icing dock at 3 p.m. (Tr. 108, 180, 272). At 4 p.m. on July 17, 1952, a fruit train composed of 55 refrigerator cars was spotted on tracks 12 and 13 for icing by the Addison-Miller crew (Tr. 771). The icing of this train was completed around 6 p.m. and the train left the yards at 7 p.m. (Tr. 772). A refrigerator train for icing was due in the yard at 9:35 p.m. (Tr. 594) and another fruit train was due at 11:30 p.m. (Tr. 793). Appellee's yardmaster, Crump, knew that after the first fruit

train departed at 7 p.m. it was necessary for the Addison-Miller employees to get the icing dock prepared to service the trains arriving after 7 p.m. (Tr. 795, 799).

Some time around 7 p.m. Stintzi, Allen Maine and Ray Davis, left the premises for supper (Tr. 180, 182, 210, 212, 236, 272). On their return to the icing platform they were advised that ice had become caked up and trouble had occurred in the conveyor belt near the slush pit or sump (Tr. 186,, 709). The Addison-Miller foreman, Fincher, directed Stintzi and a crew of three consisting of Allen Maine, Joe Vallorano and John Tarnaski (Tr. 112, 113, 213, 236, 274) to clean out the ice slush from under the pulley belts in the conveyor chain, remove the slush ice from the slush pit, take it across track 13 and dump it on the common dumping ground (Tr. 112, 114, 131, 132, 193, 212, 213, 264, 274, 275). Another part of the crew was instructed to unload salt from a salt car then spotted in a line of cars on track 13 opposite the salt pit (Tr. 125, 160, 215, 222, 317, 318).

Stintzi, Maine, Vallorano and Tarnaski proceeded down to the slush pit (Tr. 186, 213). Tarnaski and Vallorano worked in the pit filling a large bucket with slush weighing 25 to 40 pounds (Tr. 114, 214, 276) which was then passed to Stintzi and Maine (Tr. 113, 275) who carried it up the stairs leading east from the slush pit (Tr. 114, Ex. 4) and then out the doorway on the north side of the icing dock im-

mediately adjacent to track 13 (Tr. 114, 276, Exs. 7, 16). Track 13 was then occupied by a string of freight cars. The cars extended to the west as far as the eye could see (Tr. 124, 125, 132, 276). To the east were a number of cars including the salt car then being unloaded into the salt pit (Tr. 125, 126, 132, 189, 761). The usual platform extended from the floor of the salt car to the floor of the salt pit (Tr. 190, 192, 268, 298).

Young Stintzi and Maine decided that in order to dump the slush across track 13 as directed, it was necessary to go between the coupling of 2 freight cars immediately to the west of the doorway to the icing dock and slush pit (Tr. 115, 215, 217, 277). That such determination was a reasonably prudent one under the circumstances is indicated by the following facts:

(a) Stintzi and Maine, 16 and 17 years of age, had been expressly directed by their foreman, an adult of 26 years experience on the icing dock (Tr. 699), to dump the slush ice on the dumping ground north of track 13 (Tr. 112, 114, 213, 702, 714). The foreman, Fincher, knew there was a string of cars on track 13 (Tr. 722);

(b) Stintzi and Maine had been instructed not to dump ice (Tr. 242) and not to walk underneath the dock because of the danger of falling ice (Tr. 257, 258);

(c) To the west the cars on track 13 extended as far as the eye could then see (Tr. 124, 125, 132, 276). To the east the platform between the salt car and salt

pit was an effective barrier (Tr. 124, 125, 132, 190, 192, 215, 216, 241, 268, 277);

(d) The fact that salt was being unloaded from a salt car was insurance that the cars on track 13 would not be moved (Tr. 159, 160, 296). Even appellant's assistant yardmaster admitted that when salt cars were being unloaded, all foremen were notified, and every precaution was taken that cars on track 13 would not be disturbed and the men would be protected (Tr. 624);

(e) Stintzi, Maine and the others had never seen cars floated in on either tracks 12 or 13 when work was in progress on and about the icing dock and had no reason to anticipate that such would be done (Tr. 197, 198, 223, 245, 282, 296, 338, 340).

In the slush dumping operation Stintzi would proceed beneath a coupling between cars to the north side of track 13. Maine would then pass the bucket under the coupling to Stintzi who dumped the ice north of track 13 and then passed the empty bucket back to Maine. Stintzi would then return under the coupling to the south side of the track (Tr. 127, 244). On several occasions Vallorano took Stintzi's place and proceeded under the coupling in the same manner (Tr. 239, 240, 275, 277).

During the time this operation was in progress, the white overhead lights on the icing platform were illuminated (Tr. 226, 278, 283, 309, 337, 338, 601, 725, 726), as a certain indication to Northern Pacific per-

sonnel that Addison-Miller employees were working on and around the icing dock and tracks 12 and 13 (Tr. 394, 396, 418, 419). At approximately 8:20 p.m. after carrying slush ice in this fashion for from one-half to one hour (Tr. 278), Stintzi was passing the empty bucket from the north side of the coupling to Maine on the south when the standing cars were suddenly and violently set in motion (Tr. 132, 133, 219). Stintzi was thrown beneath the wheels, dragged along the track, and sustained the serious injuries for which recovery was awarded in this action (Tr. 130-134, 221, 222, 278-281). Young Maine was also struck but succeeded in grabbing and holding on to a ladder on the rear of the freight car to the east as he was dragged down the track, and so avoided serious injury (Tr. 219-222).

The standing cars were struck from the west by a string of 14 empty and unattended freight cars which had been disengaged from a switch engine in front of the yard office some 2050 feet west of the icing dock and which had drifted into and along track 13 at a speed of 3 to 4 miles per hour (Tr. 386, 387). Approximately 8 minutes were required for the cars to travel that distance (Tr. 806, 807). This switching operation was directly supervised by appellant's switch foreman, L. W. Prophet, who worked under the orders of James Crump, yardmaster (Tr. 375, 379). At the time the cars were disengaged in front of the yard office and permitted to drift unattended down track

13, yardmaster Crump had actual knowledge that Addison-Miller employees were working on and around the icing dock (Tr. 796, 797) but did not take that fact into consideration (Tr. 799).

Although foreman Prophet disclaimed actual knowledge as to whether any of the standing cars on track 13 were or were not then being loaded or unloaded (Tr. 422) the illumination of the overhead lights on the icing platform was admittedly a definite and certain indication that Addison-Miller employees were working on and about the dock, the cars and track 13 (Tr. 394, 396, 418, 419), but Prophet could not recall whether he took that fact into consideration (Tr. 403, 404). Absolutely no precaution was taken by any Northern Pacific employee to advise Addison-Miller employees that unattended cars were drifting along track 13 approaching the icing dock around which those employees were then engaged in the performance of their duties (Tr. 397, 402).

A loud speaker system and a telephone communication system were in operation between the yard office and the icing dock and had previously been used to advise Addison-Miller employees of the movement of cars (Tr. 397-402). On the occasion in question neither system was so used (Tr. 402) although such advice could have been given in a matter of seconds (Tr. 788).

On this evidence, the District Judge properly held that issues of fact as to the status of appellee, as to

appellant's primary negligence and as to appellee's contributory negligence were presented for determination of the jury (Tr. 504-508) and all issues were so determined in favor of appellee.

ARGUMENT

Answer to Specifications of Error I, II & III.

Any citation of authority is unnecessary for the elementary propositions that the weight and credibility of the testimony are for the jury, that conflicts in evidence should be resolved in favor of the plaintiff, and that the evidence is to be viewed in its aspects favorable to the plaintiff's case.

Applying the elementary propositions to a case directly presenting the same contentions made by appellant in its first three specifications of error, we note the following language:

> "By the verdict the jury determined against appellant the issues that appellee was an invitee, appellant was negligent and appellee free from negligence proximately contributing to his injury. Ordinarily these are questions of fact for the jury. We are asked to hold as a matter of law that each issue was erroneously determined. To reach such conclusion we must be able to say that no other reasonable inference may be drawn from the facts shown by the evidence. Where there is conflict we consider only such evidence and reasonable inference thereon as tend to sustain the verdict."

Silvestro v. Walz, 51 N.E. 2d 629 (Indiana).

Examination of appellee's Restatement of the Case, viewed in the light and scope of this Court's appellate power of review as to these questions, requires affirmance of the verdict and judgment.

Appellant does not dispute the proposition that the minor, Gerald Stintzi, was an invitee "while he was in the ice dock, or on the platform, or in the tunnel, or in the ice house, or while he was unloading salt from the interior of a box car and across the elevated ramp into the salt room, or while he was working between the elevated platform and the tops of refrigerator cars in *icing operations*" (Brief of Appellant, p. 23; see also pp. 28 and 29 of Appellant's Brief). Appellant, however, contends that, as defined in its Brief, the invitee status of the minor Stintzi was limited to the places on the premises and the operations as described in the quoted portion of the Brief set out above.

As we understand appellant's position, it asserts that any act done by the minor Stintzi, though it might be reasonably contemplated and necessary in the performance of duties required of the invitee, but which exceeded the boundary specified by appellant, would, *ipso facto,* constitute Stintzi a licensee or trespasser. Thus, if the two youngsters, Stintzi and Maine, or either of them, had been injured through some negligent act of the appellant while they were dumping the ice in "a large open area to the west" and contrary to instructions of their foreman Fincher,

they would be licensees despite appellant's alternate suggestions in its Brief that Stintzi should have done so (P. 34 Appellant's Brief). We contend, and shall show, that such is not the law.

The minor Stintzi was, without question, an invittee as defined by the Supreme Court of the State of Washington, and by the conclusive weight of authority, both judicial and text.

Mitchell v. Barton, 126 Wash. 232, 217 Pac. 993;
Holm v. Inv. & Securities Co., 195 Wash. 52;
Grove v. D'Allessandro, 38 Wash. 2d 421, 235 Pac. 2d 826;
Dingman v. A. F. Mattock Co., 15 Cal. 2d 622, 104 Pac. 2d 26;
Leenders v. California Hawaiian etc. Corp., 139 Pac. 2d 987 (California).

"A test commonly applied in determining the status of a person who goes upon railroad premises as an invitee or licensee is the presence or absence of a mutual interest or advantage to both the visitor and the railroad company in his presence there."

44 Am. Jur., Sec. 426, p. 644.

Also see discussion 44 Am. Jur., Sec. 429, pp. 648-650 incl.

Appellant's authorities cited in its Brief (see pp. 20-36 incl.) are acceptable only as correct statements of the law applicable to the *ad hoc* situations therein presented. As such, the authorities are clearly distinguishable.

Dotson v. Haddock, 146 Wash. Dec. p. 47, 278 Pac.

2d 338, presented a situation where the plaintiff was injured as the result of an accident on the steps while leaving defendant's home. The presence of plaintiff in defendant's home related solely to a moral or spiritual benefit, the parties having assembled at defendant's home as a group of religious people interested in the promotion of certain Christian principles. Plaintiff was not an invitee.

In *McNamara v. Hall,* 38 Wash. 2d 864, 233 Pac. 2d 852, the plaintiff sustained an injury while riding in the home elevator of the defendant and was not therefore by virtue of that and the related facts an invitee.

In *Deffland v. Spokane Cement Co.,* 26 Wash. 2d 891, 176 Pac. 2d 311, the plaintiff's son was killed as the result of attempting to retrieve pigeons from the defendant's premises and the minor was clearly not an invitee, nor did the facts of the case bring it within the "attractive nuisance" doctrine.

In *Garner v. Pacific Coast Coal Co.,* 3 Wash. 2d 143, 100 Pac. 2d 32, the injured plaintiffs were two girls who fell through a pathway on defendant's premises and suffered severe burns to their feet from live coals which were some distance underneath the pathway, and the Court determined that under all the circumstances the injured parties were not invitees.

Christiansen v. Weyehaeuser Timber Co., 16 Wash. 2d 424, 133 Pac. 2d 797, is discussed factually by appellant. Clearly the Court's language and the fact

statement of the appellant distinguish that case. The act of the plaintiff in going to an area completely outside of an easily defined area, within which plaintiff could have been an invitee, and there engaging in an activity of no actual or potential mutual benefit to defendant, stamped plaintiff as a licensee.

Hansen v. Lehigh Valley Ry. Co., 120 F. 2d 498, presents an *ad hoc* situation, as may be clearly seen from the preliminary discussion of the Court in that opinion. Nor is there any similarity between the instant cause and that case which could be characterized within the expression of Scrutton, L. J. set out in the *Lehigh* opinion.

The minor Stintzi, along with another young boy of the age of sixteen, Allan Maine, and Joe Vallorano and John Tarnaski, were ordered to clean out the slush ice from under the pulley belts in the conveyor chain, which was the only medium that Addison-Miller had to bring the ice from the ice house along the lower level, and up onto the ice dock for the required purpose of icing the refrigerator cars of the appellant railroad. Stintzi and the other men had been so directed by the foreman for Addison-Miller, Robert C. Fincher, because the ice was becoming caked up and trouble had occurred in the conveyor belt (Tr. 186, 709). That the efficient, uninterrupted use of the conveyor belt was necessary, requires no argument in view of the appellant's concession that it had a direct and vital interest in the icing operations of Addison-

Miller (Tr. 539-540). It follows that if the ice must be cleaned out from the sump pit and from around the conveyor chain, it must likewise be removed. The proper functioning of all machinery in Addison-Miller's operation was an indispensible requirement of operation—as much so as the freezing process in the ice house, the distribution on the ice dock, the unloading of salt, the conveying of salt from the ground level to the ice dock by the gig, the placing of ice in the cars, the salting of the ice, the checking by the appellant of the refrigerator cars which were to be iced, and were iced, the provision for disposition of unused materials and the like.

Certainly no one would dispute the fact that in the mining industry many necessary operations are required for the efficient conduct of the whole. Equipment of varied types, including bits, trains and cars, etc. are required; various classified types of employees are needed in different operations, such as the hoist man, the driller, the timber man, the powder man, the mucker, etc., and likewise in the steel mill there is the required transportation of scrap to the scrap yard; the process of mixing scrap with other crude ores and with carbon; the heating and smelting process; the pouring and moulding process for ingot production, the rolling sheds for the fabrication of all types of steel—flat, angle and corrugated, and the disposal of waste. Plainly, all phases of an operation are important to its general over-all function. Cer-

tainly it can be said that all of the operational phases of Addison-Miller, including ice removal from the conveyor belt, are reasonably embraced within the expected and necessary duties of its employees.

Foreman Robert C. Fincher, an experienced supervisor, directed the minor Stintzi, along with others, to perform an operation which he, as foreman, had authority to direct. Mr. Fincher had been the foreman of the ice dock for Addison-Miller for ten years. He had worked for Addison-Miller on the ice dock prior to the date of the accident for a period of twenty-six years. He told Stintzi where to dispose of the slush ice, and he directed him to take it across Track 13 and dump it (Tr. 714). According to Mr. Fincher, slush ice had been dumped in the same place for twenty-six years (Tr. 744).

"Q. How long have you dumped slush ice over there?

A. Ever since I have been there.

Q. Ever since you have been there?

A. Yes.

Q. Taken the slush ice over and dumped it in the same place, is that correct?

A. Yes, sir.

Q. And that is what you instructed these two boys to do?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir." (Tr. pps. 744 and 745)

And certainly other refuse and trash and papers and salt sacks had been dumped in the same place for ten years, or longer (Tr. 714, 715; Statement of Case).

Appellant in its Brief, labors to create the impression that slush ice had been dumped north of Track 13 on only two or three previous occasions. The fact of the matter is that slush ice had been dumped a great number of times, but mostly on the daylight shift. Mr. Fincher, himself, according to his testimony, had only cleaned and dumped slush ice approximately three times (Tr. 705).

The conclusive and ultimate proof that appellant recognized the area north of Track 13 as a common dumping ground for Addison-Miller in its ice operation is implicit in the direct testimony of Mr. Fincher while under examination by appellant's own counsel: (Tr. 703)

> "Q. And what did you tell them?
> A. I told them not to go through them cars, to go around the end of the cars.
> Q. How many cars were on Track 13?
> A. I think they would have to go around about two and a half. I don't think the third car was quite even with where they came out with the slush.
> Q. You mean—
> A. It might have been.
> Q. —to go to the east two and a half cars?
> A. Two and a half car lengths, possibly three."

The evidence wholly preponderates, by virtue of the above, for the proposition that Stintzi was an invitee when using the common dumping ground, and that appellant fully recognized the use of that common dumping ground as being reasonably embraced within the area for the performance of the duties of

the Addison-Miller employees. The admissions of responsible officials for appellant railroad indicate that it recognized that the area north of Track 13 was a common dumping ground in the sense which the law understands that phrase. These officials knew that the use of the area by Addison-Miller was contemplated by the contracting parties and was reasonably embraced within the work area of Addison-Miller employees (Tr. 547, 788, 789). Consequently, it seems clearly definite that Stintzi, when dumping the ice bucket north of Track 13, was acting as a result of implied invitation, if, in fact, he was not there by direct invitation in accord with the circumstances and the operation of the law applicable.

Implied invitation arising from the facts in this case has judicial approval in the State of Washington. In *Great Northern v. Thompson,* 199 F. 395, 9th Circuit, the Court considered the following facts: A crossing was habitually used by people in Leavenworth, Washington, in going to and fro, and this use had continued for a number of years. Some time prior to the accident involved the company has posted "no trespass" signs in the area. At 10:45 on a dark night, the plaintiff, while crossing in the usual place, was struck by a caboose which had been floated down the track unattended by defendant railway company. We quote the Court:

> "The question of contributory negligence is a question of fact, to be passed upon by the jury whenever the undisputed facts are such that dif-

ferent minds might reasonably come to different conclusions as to the reasonableness and care of the injured party's conduct. If the evidence is such as to leave the mind in a state of doubt on the subject, the case should not be withdrawn from the jury. These principles are so well established as to require the citation of no authority. It may be added that the question whether or not the person injured is guilty of contributory negligence may often depend upon a variety of considerations. The question is not always answerable by pointing to the fact that the injured party might have used a safe way. Whether a reasonably prudent person would have taken the safe way may depend upon the conditions and the circumstances, the accessibility and the proximity of the safe way, the difficulties and obstructions to the use of the safe way, the extent of the public travel on the chosen way, the frequency of the passage of trains over it, and alertness in looking out for passing trains. There was evidence tending to show that there was not a perfectly safe and equally convenient path at the side of the track; that, while there was a pathway between the track and the ravine, it was a very rough pathway, made of loose cinders, which were being dumped on it at that time; and that at places the width of the path between the track and the gulch was very narrow, and that at one place it was obstructed by a pile of timbers. . . ."

The Court's decision in this case and its reasoning is in harmony with the Supreme Court of the State of Washington.

In *Imler v. Northern Pacific Ry. Co.,* 89 Wash. 527, 154 Pac. 1086, the appellant relied upon the rule announced in *Great Northern v. Thompson, supra,* as

follows:

> "We take it to be well settled that railroad companies are charged with the duty of exercising ordinary care to discover the presence of persons on their tracks, and to avoid injuring them at those places where, under all the circumstances, they are reasonably chargeable with knowledge that such persons are liable to be; and in our judgment it can make no difference so far as the duty of the railroad is concerned, whether such persons are technically to be classed as trespassers, licensees, or persons using the company's tracks as of right. In all such cases the duty is imposed because of the broad rule of humanity that one engaged in so dangerous a business is required to exercise ordinary care to avoid injuring another, when the presence of and danger to such other person is reasonably to be anticipated."

The Court in *Imler* distinguished the facts and law applicable there, but had this to say about *Great Northern v. Thompson, supra*:

> "Recoveries are allowed in such case because a higher duty rests upon a railroad company under such circumstances. In moving trains over and across the streets of cities, or through depot grounds or in switch yards, the railroad company, from the nature of things, must have its trains under control and be constantly alert to the possibility of injuring persons or property. . . .
>
> "The crossing cases may be further distinguished. They rest in implied license upon legal grounds as differentiated from the acts or conduct of the parties as they may arise in a particular case. In consequence, a duty is put upon the court in all such cases to measure the relative rights as well as the relative obligations of the parties to the action. The company is held to

a rule of strict accountability, because it is necessary for men and traffic to cross railway tracks in the pursuit of their legitimate undertakings and conveniences. The law charges a company with a knowledge that they will do so. Whereas, one who walks along a railroad track using it as a footpath, especially where the track is in the country and fenced, cannot claim the protection given to those who do things of necessity, for, from the very nature of things, he is using the track for his personal comfort and convenience. Men must, and therefore may, move from one side of a track to another at places established by the company, or so long used by the public as to imply a license, resting under the assumption of legal right. . . . The cases all rest in the same sound principle which controls every exploration into the law of negligence—that is, that the degree of care in every case shall be measured, not by any abstract rule, but by reference to the facts and circumstances attending the particular case."

The same reasoning has been applied in text analysis of *Great Northern v. Thompson, supra,* in 44 Am. Jur., Sec. 438, page 633, where the pertinent text material is the latter part of the quoted statement.

"An implied invitation to use railroad tracks as a footpath has been held not to arise from acquiescence in such use where a sign is conspicuously posted warning persons not to do so. A railroad company is said to have performed its duty with respect to warning pedestrians off its track between stations and crossings when it maintains along the track fences and guards and notices forbidding trespassing upon the property. There are, however, decisions to the effect that a railroad company which has permitted the use of its tracks by pedestrians between two points can-

> not relieve itself from the obligation to use reasonable care in handling its trains there by merely posting 'no trespass' signs along the tracks, if they have been so generally disregarded as to raise a presumption of acquiescence on the part of the railroad company."

Without concession to appellant's contentions, we suggest that it is highly important to note that this accident occurred within the so-called permissible boundaries of operations specified by appellant in its Brief. We concede, of course, that the accident did not happen on the top of a refrigerator car, or in a salt car, or in the passageway between the salt car and the salt shed, but on the ground area directly underneath what would be the north top level of a freight car standing on Track 13. True, the dumping ground where Stintzi was carrying the ice was approximately five to six feet, or one or two quick steps, north of the point where the accident occurred (Tr. 127). In any event the distance to the dumping ground from the exit of the ice house was probably no more than fifteen feet. These facts establish conclusively that it is almost an absurdity to restrict the invitation to Stintzi as proposed by appellant. Appellant's statement that it was not interested in the continuous operation of the chain which supplied ice for the icing of its cars is completely contradicted by the assertion of the mutual interest of appellant in the icing operation, as testified to by its officials.

In *Chicago I. & L. R. Co. v. Pritchard,* 168 Ind.

398, 79 N.E. 508, an employee of a shipper loading poles on a railroad car went around the end of the car for some purpose which the evidence did not directly disclose, and as a result was struck by a train approaching the area. The employee, it appeared, was not directly engaged in the loading or unloading of the poles in the area in which he was injured. The Court, in speaking of the situation, said as follows:

> "It is true that the evidence does not directly disclose why he went to the east side of the car, but it must be remembered that he was a servant, and that obedience is due from such a one. The call to stop the train, wherever it came from, naturally suggested that the danger might have something to do with the car which appellant was helping to load for his master. While it may be that decedent went where he did out of a prompting which was not unmixed with curiosity, yet it is difficult in view of the circumstances, to resist the conclusion that he was moved by his plain duty to be on hand should the emergency, whatever it was, require. We are of opinion that, in the free logic which we have had occasion to observe that a jury may exercise (*McCarty v. State,* 162 Ind. 218, 70 N.E. 131), it was competent for the jury to conclude that decedent was moved to go where he did, in part at least, out of a prompting of duty."

The question of implied invitation and the extent of the appellant's invitation to Stintzi are clearly fact questions in this case that were properly submitted to the jury. The question as to the extent of an invitation is usually one for the jury and not for the Court. The rule is particularly applicable here

because the great weight of authority supports the proposition that the invitation extends to those parts of the premises, where the invitee under circumstances and conditions of his invitation, would naturally be likely to go; or such premises as would reasonably be embraced within the object of the invitee's visit.

44 Am. Jur. 663;
Grove v. D'Allessandro, 38 Wash. 2d 421, 235 Pac. 2d 826;
Boucher v. American Bridge Co., 213 Pac. 2d 537 (California);
Biondini v. American Ship Corp., 185 Pac. 2d 94 (California);
Gastine v. Ewing, 150 Pac. 2d 266 (California);
Morris v. Granato, et al, 133 Conn. 295, 50 A. 2d 416;
Silvestro v. Walz, 51 N.E. 2d 629 (Indiana);
Pauckner v. Wakem, 83 N.E. 202 (Illinois);
Ellington v. Ricks, 178 N.C. 686, 102 S.E. 510;
Franey v. Union Stockyards & Transit Co., 235 Ill. 522, 85 N.E. 750.

The foregoing authority establishes a standard for the jury's determination. That the jury correctly and properly found Stintzi to be an invitee in accord with the recognized legal standard is conclusively established by the following pertinent facts:

(a) Stintzi and Maine, 16 and 17 years of age, had been expressly directed by their foreman, an adult of 26 years experience on the icing dock (Tr. 699) to dump the slush ice on the dumping ground north of

Track 13 (Tr. 112, 114, 213, 702, 714). The foreman, Fincher, knew there was a string of cars on Track 13 (Tr. 722);

(b) Stintzi and Maine had been instructed not to dump ice (Tr. 242) and not to walk underneath the dock because of the danger of falling ice (Tr. 257, 258);

(c) To the west the cars on Track 13 extended as far as the eye could then see (Tr. 124, 125, 132, 276). To the east the platform between the salt car and salt pit was an effective barrier (Tr. 124, 125, 132, 190, 192, 215, 216, 241, 268, 277);

(d) The fact that salt was being unloaded from a salt car was insurance that the cars on Track 13 would not be moved (Tr. 159, 160, 296). Even appellant's assistant yardmaster admitted that when salt cars were being unloaded, all foremen were notified, and every precaution was taken that cars on Track 13 would not be disturbed and the men would be protected (Tr. 624);

(e) Stintzi, Maine and the others had never seen cars floated in on either Tracks 12 or 13 when work was in progress on and about the icing dock and had no reason to anticipate that such would be done (Tr. 197, 198, 223, 245, 282, 296, 338, 340).

(f) The Northern Pacific had a direct and vital interest in all the icing operations of Addison-Miller (Tr. 539, 540) including the dumping of slush ice necessary to keep the conveyor belt in operation (Tr.

186, 709). For at least 10 to 26 years this slush ice had been dumped north of Track 13 on the common dumping ground (Tr. 714, 715; 744, 745). In the face of this undisputed fact it will not suffice for appellant's employees to now fail to recall previous knowledge of it (Tr. 548, 547, 789, 790). This continuous usage of itself establishes appellant's acquiescence in it. Even as stated by appellant (Appellant's Brief p. 25):

> "An invitation . . . may be *implied* when such owner or occupier by acts or conduct leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared and allowed to be used."

Appellant was guilty of negligence. The duty of defendant railroad has been recited heretofore (*Great Northern v. Thompson, supra*), and the rule in that case is amply suppoted by authority.

> *Spots v. Wabash West. Ry. Co.,* 20 S.W. 190 (Missouri);
> *Chicago & Erie Ry. Co. v. Shaw,* 116 F. 621;
> *Neal v. Curtis & Co. Mfg. Co., et al,* 41 S.W. 2d 543.

The cases cited by appellant (pp. 37-38 Appellant's Brief) are meaningless. The question involved here is whether the defendant knew, or should have known, that the plaintiff was working in the particular area around the cars, and if it did know of this fact, or

should have known of it (it admittedly did know—Tr. 796, 797; 394, 396; 418, 419) it was chargeable with negligence in sending fourteen cars unattended into a collision with the standing cars. None of appellant's cases have the factual counterpart in the instant cause. Nor did appellant have any absolute right, as it contends, to rely upon blue lights being displayed so as to exonerate it from liability.

In *Louisville & N. R. Co. v. Payne's Admr.*, 197 S. W. 928 (Kentucky), it was said:

> "It is further insisted that the company did not owe decedent any duty because of his failure to apprise its employees of his presence under or between the cars by means of a blue flag, as required by the company's rules. There may be cases where no duty arises until the employee places the warning signal, but these are cases where the company is under no obligation to anticipate the presence of such employee. *Kentucky & Tennessee Ry. Co. v. Minton,* 167 Ky. 516, 180 S.W. 831. We are not prepared, however, to hold that in every instance the railroad company has discharged its full duty to its car inspectors and repairers whose work is of a peculiarly hazardous character by merely promulgating a rule requiring them to protect themselves by placing a certain flag. In yards like those at Lebanon Junction, where many men are employed, and several trains come and go each day, and a great deal of switching is done, and numerous cars must necessarily be inspected and repaired by men who frequently go under and between the cars for but a short period of time, we conclude that the company is under the humane duty to anticipate the presence of such employees under or between the

cars and to take such precautions for their safety as a proper lookout and timely warning of approaching cars will afford; and this duty is owing, whether the injured employee protects himself by means of a blue flag or not, and particularly so where, as in this case, there was substantial evidence that the rule requiring such action on his part was habitually disregarded with the acquiescence of those employees of the company superior in authority to the injured employee. *C.N.O. & T.P. Ry. Co. v. Lovell's Admr.,* 141 Ky. 249, 132 S.W. 569, 47 L.R.A. (N.S.) 909; *L. & N. Ry. Co. v. Johnson's Admr.,* 161 Ky. 824, 171 S. W. 847; *Norfolk & Western Ry. Co. v. Short's Admr.,* 171 Ky. 647, 188 S.W. 786.

"But it is suggested that decedent assumed the risk of injury because of his failure to put out a blue flag, and is therefore not entitled to recover. Of course, it might be said that decedent's failure to put out a blue flag was the sole cause of his injuries, if the company owed him no lookout or warning duty in the absence of the flag, and the rule requiring him to protect himself in that manner had not been habitually disregarded with the acquiescence of the company. In view, however, of our conclusion that the company owed him a lookout and warning duty, notwithstanding his failure to observe the rule, it is clear that such failure cannot be regarded as the sole cause of his death, but might constitute contributory negligence going to the dimunition of damages. . . ."

Likewise in *Southern Ry. Co. v. Wilkins,* 178 N.E. 454 (Indiana), is was said:

"There appears to have been introduced in evidence a rule of the operating department of the Southern Railway system in the following words:

" 'A blue signal displayed at one or both ends of an engine, car or train indicates that workmen

> are under or about it, when thus protected it must not be coupled to or moved. Workmen will place the blue signals and the same workmen are alone authorized to remove them. Other cars must not be placed upon the same track so as to intercept the view of the blue signals, without first notifying the workmen.'
>
> "This rule appears to prohibit the running of cars upon a track where a blue flag is placed, but it does not exempt the railroad company from exercising due care when there is no blue flag and it is a question for the jury to determine that fact, and the evidence adduced above is sufficient . . ."

Of course, even if the fact of some negligence on the part of Addison-Miller was conceded, it could not be imputed to Stintzi. If appellant was guilty of negligence which was the, or a proximate cause, then appellant is legally responsible.

In *The Joseph B. Thomas,* 86 F. 658 (9th Circuit), we find the following:

> "The mere fact that another person concurs or co-operates in producing the injury, or contributes thereto, *in any degree, whether large or small, is of no importance.* . . . It is immaterial how many others have been in fault, if the defendant's act was an efficient cause of the injury." (underscoring supplied)
>
> "It is no defense, in an action for a negligent injury, that the negligence of the third person, or an inevitable accident, or an inanimate thing, contributed to cause the injury of the plaintiff, if the negligence of the defendant was an efficient cause of the injury. In such cases the fact that some other cause operates with the negligence of the defendant in producing the injury

does not relieve the defendant from liability. His original wrong concurring with some other cause, and both operating proximately at the same time in the production of the injury, he is liable to respond in damages, whether the other cause was guilty or an innocent one."

ANSWER TO

SPECIFICATIONS OF ERROR IV AND V

Appellant assigns error on the admission in the evidence of Rule 805 of the Consolidated Code of Operating Rules and General Instructions (Tr. 799-801) and upon the Court's instruction referring thereto (Tr. 885-886).

Appellant's basic defense was that in shunting the unattended cars on to track 13 the Northern Pacific personnel was relying upon the blue light rule and upon the absence of a blue light at the west end of the icing dock (Tr. 97, 101). Appelant's foreman, Prophet, and yardmaster, Crump, testified that they had in mind only the blue light rule when these unattended cars were disengaged (Tr. 395, 403, 410, 419, 765, 766, 786, 787, 799, 822-825). In view of this testimony it was most proper to inquire as to whether Crump and Prophet had also in mind Rule 805 (Tr. 419-421, 799-800, 814-816). Rule 805 was admittedly applicable to the situation here presented (Tr. 815-816, 419-421, Apps. Br. 45).

"The question of the admission in evidence of rules of the defendant carrier, governing the operation of

its trains or cars, and issued to its employees, when such rules had been offered by the plaintiff, has been passed upon in many jurisdictions, and, almost without exception, the courts have held such to be proper evidence, although not conclusive of negligence * * *. The prevailing ground, however, upon which such evidence is admitted is that these rules to employees indicate the necessity of care under the particular circumstances covered by the rules, and are in the nature of an admission by the railroad that due care, under the circumstances, required the course of conduct required by the rule * * *. Such evidence has been generally held admissible in cases of injuries to third persons, as well as to passengers." *Canham v. R. I. Co.,* 85 Atl. 1050, 1055.

See also: *Stevens v. Boston Elevated,* 69 N.E. 338; *Hurley v. Connecticut Co.,* 172 Atl. 86; *Deister v. Atchison T. & S.F. Ry. Co.,* 162 P. 282; *Palmer v. Long Beach,* 189 P. 2d 62; *Callaway v. Pickard,* 23 S.E. 2d 564; 2 *Wigmore, Evidence,* 3d Ed. Sec. 282.

Failure of the appellant to give any warning of the impending approach of the unattended cars having been alleged (Tr. 16, 26), it was not necessary to plead Rule 805 to make examination thereon proper or to make the rule admissible in evidence. *Callaway v. Pickard,* 23 S.E. 2d 564, 574; *Pollard v. Roberson,* 6 S.E. 2d 203.

Appellant complains that the trial court's instruction (Tr. 885, 886) made appellant an absolute insurer

of Stintzi's safety. Such conclusion is unwarranted. The jury was directly instructed that "the defendant is not the insurer of the safety of Gerald Stintzi" (Tr. 877) and was many times instructed that liability could only be predicated upon a finding of negligence which was a proximate cause of the injuries alleged (Tr. 870-893). The instruction complained of merely advised the jury that regardless of the blue light rule or arrangement relied upon by appellant, if the appellant "had any reason to anticipate that persons might lawfully be employed in, on, under or about standing cars, it was under a duty reasonably to warn such persons of any movement of the cars which might endanger them" (Tr. 885, 886). No exceptions were taken to similar instructions advising the jury to the same effect (Tr. 881, 882, 887).

ANSWER TO

SPECIFICATION OF ERROR VI

Appellant complains that the instruction referred to (Tr. 886-887) authorizes recovery upon a finding of slight negligence which was less than a material or proximate cause of the injury alleged. When considered in the light of the instructions as a whole the instruction referred to is not subject to the construction placed upon it by appellant.

The jury was advised that the action was based on a charge of negligence, and negligence was properly defined with instruction that negligence is never pre-

sumed but must be established by a preponderance of the evidence (Tr. 876-877). The jury was specifically instructed that:

> "* * * in order to find the defendant railway company negligent in this case, you *must* find from the preponderance of the evidence, that when the defendant, through its agents and employees, shunted freight cars onto Track 13 and caused them to drift into and against the freight cars between which Gerald Stintzi was located, the defendant, through its agents and employees, know or should have known, in the exercise of reasonable care, that employees of Addison-Miller Company were engaged in work of such nature that they would be endangered by the movement of the cars. If you should find that the railway company, through its agents and employees, knew or should have known at the time that Addison-Miller employees were engaged in work which would cause them to be endangered by the movement of the cars, then the defendant was negligent, and if you further find that such negligence was a proximate cause of the injuries to Gerald Stintzi, and that Gerald Stintzi himself was not guilty of contributory negligence, your verdict should be for the plaintiff.
>
> "On the other hand, if you should find that the defendant railway company, through its agents and employees, at the time it shunted the cars into and against the cars on Track 13 between which Gerald Stintzi was located had no knowledge or reasonable cause to believe that the employees of Addison-Miller Company were so engaged as to be endangered by the movement of the cars, then the Northern Pacific Railway Company was not negligent in moving the cars and your verdict should be for the defendant." (Ital-

ics ours) (Tr. 881-882).

Even though a detached statement in instructions may be subject to technical criticism, all of the instructions must be considered together, and if, as a whole, they fairly state the law, no prejudicial error may be claimed. *Lee and Eastes v. Continental Carriers,* 44 Wn. 2d 28, 265 P. 2d 257; *Robbins v. Greene,* 43 Wn. 2d 315, 261 P. 2d 83; *Myers v. West Coast Fast Freight,* 42 Wn. 2d 524, 256 P. 2d 840.

An almost identical criticism to a detached statement in instructions was made in the case of *Davis v. Falconer,* 159 Wn. 230, 292 P. 424, wherein, in disposing of such criticism, the Court stated:

> "In the instructions given subsequent to Nos. 7 and 8, the jury were specifically told that, if they found certain facts, the verdict should be in favor of the respondent, and that if they found certain other facts, the verdict should be for the appellants. The instructions, when they are read in their entirety, are clear and explicit, and the jury could not possibly have been misled by the use of the expression 'any negligence,' as it appears in instructions Nos. 7 and 8. * * *"

ANSWER TO

SPECIFICATION OF ERROR VII

Appellant assigns error on refusal to give that portion of appellant's requested instruction No. 3 (Tr. 34-36) to the effect that "it is the law that one having a choice between methods of doing an act which are equally available and who chooses the most dan-

gerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly going into a position of danger." The balance of appellant's requested instruction No. 3 was given verbatim by the District Judge (Tr. 882-883).

As applied to the facts of this case, the omitted portion of instruction No. 3 is not a proper statement of law. To instruct the jury that the failure of Stintzi to take a route, which now in retrospect, may appear to have been safer, constituted negligence on his part as a matter of law, would have been error. The determination of contributory negligence in this case depended upon many and various facts and circumstances. The instruction as worded would have removed from the jury's consideration the facts that at the time Stintzi, Maine and Vallorano determined to go across track 13 between cars in order to dump the slush ice as they had been directed, there were cars extending to the west of the icing dock as far as one could see (Tr. 124, 125, 132, 276); that the platform between the salt car and salt pit to the east prevented passage in that direction (Tr. 124, 125, 132, 190-192, 215, 216, 268, 277); that they had never seen freight cars floated in on track 13 when work was in progress (Tr. 197, 198, 223, 245, 282, 296, 338, 340); the fact that they had been instructed not to dump slush ice under the dock (Tr. 242) and had been instructed not

to walk beside or under the dock because of the danger of falling ice (Tr. 257-258); and the fact that work was in progress in and between the salt car on track 13 and the salt pit (Tr. 125, 126, 132, 189, 761) which meant to them (Tr. 159, 160, 296) and even to appellant's assistant yardmaster, that every precaution would be taken that the cars on track 13 would not be disturbed unless and until proper notification and warning had been given to all concerned (Tr. 624).

In *G. N. Ry. Co. v. Thompson* (Ninth Circuit), 199 Fed. 395, this Court stated:

> "It may be added that the question whether the person injured is guilty of contributory negligence may often depend upon a variety of considerations. The question is not always answerable by pointing to the fact that the injured person might have used a safe way. Whether a reasonably prudent person may have taken the safe way may depend upon the situation and circumstances, the accessibility and proximity of the safe way, the difficulties and obstructions to the use of the safe way * * *."

The question of appellee's contributory negligence in this case under the evidence depended simply upon whether a reasonably prudent person, acting under the same or similar circumstances as the jury found to exist, would have gone between the freight cars in question. On that issue appellant received complete and most favorable instructions from the District Judge (Tr. 882-884), the District Judge even instruc-

ing the jury directly that "even though he (Stintzi) was directed by his superiors to do the very thing that he was doing when injured, he would still be contributorily negligent if you should find that a reasonably prudent person, acting under the same or similar circumstances, would not have gone between the freight cars in question or under the couplings thereof" (Tr. 884).

The refusal to grant requested instructions, even if in proper form, is not error where the subject matter thereof is sufficiently covered by other instructions and where the instructions as a whole adequately cover the issues in the case. *Arnold v. U. S. Gypsum Co.,* 44 Wn. 2d 412, 267 P. 2d 689; *Sevener v. Northwest Tractor and Equipment Corp.,* 41 Wn. 2d 1, 247 P. 2d 237; *Christensen v. Gray's Harbor County,* 34 Wn. 2d 878, 210 P. 2d 693; *Swak v. Department of Labor & Industries,* 40 Wn. 2d 51, 240 P. 2d 560.

The cases cited by appellant (Apps. Br. 50) do not involve the matter of instruction. In *Scharf v. Spokane and Inland Empire Railroad Co.,* 92 Wn. 561, 159 P. 797, it was held that under the facts there presented a naked licensee failing to exercise the highest degree of care for his own safety while walking in the middle of a railroad track instead of on a path provided for that purpose beside the track was negligent as a matter of law. In *Clark v. N. P. Ry.* 29 Wn. 139, 69 P. 636, it was only held that defendant railway company owed no duty to plaintiff, a tres-

passer, who was traversing defendant's switching yard after he had been expressly ordered off the yard.

ANSWER TO
SPECIFICATION OF ERROR VIII

Appellant assigns error upon refusal of the District Judge to give its requested instruction (Tr. 35-36) instructing the jury as a matter of law that if there were no cars being iced nor any salt car on track 13 at the time of Stintzi's injury, the verdict must be for the defendant. The requested instruction was erroneous and properly refused.

The question of appellant's negligence in failing to give Addison-Miller employees any warning of the approach of unattended cars on track 13 did not depend alone upon the existence of actual car icing operations or the presence of a salt car on track 13. Crump, the yardmaster, had actual knowledge that Addison-Miller employees were engaged in work on and around the icing dock at the time the cars were disengaged in front of the yard office pursuant to his orders (Tr. 796-799), and from illumination of the overhead white lights on the icing platform, switching foreman Prophet had certain indication that Addison-Miller employees were working on and around the dock, the cars and track 13 (Tr. 394, 396, 418, 419). Neither took these facts into consideration (Tr. 799, 403, 404) and absolutely no precaution was taken to warn or protect the men endangered by the ap-

proach of the drifting cars (Tr. 397, 402). On this evidence alone a jury finding could properly be made that appellant was guilty of the grossest negligence.

Likewise, the question of contributory negligence did not depend alone upon the existence of icing operations or the presence of a salt car on track 13. As to contributory negligence, the jury was entitled to consider the facts that work was in progress on and around the icing dock, that the white lights were illuminated as notice to appellant of work in progress, that Stintzi and his co-workers had never seen cars drifted down track 13 when any work was in progress about the icing dock and had no reason to anticipate that such would be done, and that Stintzi, 17 years of age, could reasonably assume that a foreman of 26 years experience would not order him to cross track 13 if any danger were involved in doing so.

On the evidence, aside from the presence of a salt car on track 13, there was more than sufficient in the record to justify the jury's finding that Stintzi was not contributorily negligent. The conflict in the evidence as to whether a salt car unloading operation was in progress at the time of Stintzi's injury, and as to its effect on the questions of primary and contributory negligence, were matters for argument by respective counsel and were not matters for instruction by the Court.

ANSWER TO

SPECIFICATION OF ERROR IX

As a result of the accident the minor, Gerald Stintzi, suffered profound shock, he was practically pulseless. The boy suffered a traumatic amputation of the right leg at the hip and is unable to wear a prosthetic device (Tr. 479); he suffered a fracture of the left thigh bone, and compound fractures of the right forearm. The traumatic amputation of the right leg also left a wound extending into the scrotum and rupturing the urethra, with evulsion of the right testicle. The bladder was ruptured at the outlet, there was a fracture of the right pelvic bone, and some internal hemorrhage. The injuries were critical, and the physician despaired of the boy's life. Numerous surgical operations were performed, including re-amputation, metal plates were put in the forearm, pins were put into the left leg. Skin was grafted from the abdomen onto the stump at the thigh, the forearm had to be re-opened, the hand and fingers of the right arm became stiff and remain so (Tr. 443-464). Stintzi was given twelve or more transfusions, and he was in the hospital 256 days in all (Tr. 137). He suffered terrific pain and delirium (Tr. 299-303). Gerald Stintzi requires assistance to bathe, and his mother, a graduate nurse, has cared for him since he was injured. Prior to his injury this boy was one of the most prominent athletic prospects in this area. His special dam-

ages thus far are over $12,500.00. The court, properly instructed that in awarding damages the jury should consider the nature and extent of the injuries, pain and suffering, past and future, discomfort, humiliation and embarrassment, permanency of the injuries, future medical and future personal care, loss of function.

Appellant took no exception to the instruction and proposed none. The figures proposed by appellant are wholly inapplicable—they are not assigned to the pertinent factors constituting the basis of award. There is no provision for personal care, for pain or suffering, etc., and this Court is not so unrealistic that it does not apperciate that from the award must come the costs of litigation. The verdict is not in fact such as would shock the conscience. In *Southern Pacific v. Guthrie,* 180 Fed. 2d 398, this Court sustained an award for $100,000.00 to a 61 year old railroad engineer who lost his leg midway between the knee and thigh and announced the rule that a Federal Appellate Court has no right to reduce damages, if both sides had a fair trial on the merits.

Also see: *United States v. Luehr,* 208 F. 2d 138, 9th Circuit—Award of $125,000.00 sustained.

Florida Power and Light Co. v. Robinson, 68 So. 2d 406—award of $225,360.00 sustained.

Kieffer v. Blue Seal Chemical Co., 196 F. 2d 614, 3rd Circuit—award of $250,000.00 sustained. (Although award not mentioned in affirmance, same was

returned in U. S. District Court, District of New Jersey, No. 273.)

Sullivan v. City and County of San Francisco, No. 401150. Award of $159,500.00.

This Court is familiar with the fact that there are well over fifty cases involving awards in excess of $100,000.00, and further citation is unnecessary in view of the injuries and loss suffered.

Photographs are clearly admissible in evidence in black and white or colored. Such is the overwhelming weight of opinion.

> "Exhibit P-9 was a picture of Dorothy Robertson as she appeared when the photographer came. It shows her face swollen and one eye blackened. She testified the condition of her face was due to a blow by defendant, administered immediately after the shooting while she was trying to help her wounded husband. The picture was admissible as illustrative and possibly somewhat corroborative of Dorothy's testimony.
>
> "Defendant argues it was calculated to excite passion and prejudice. *That might be true to the extent the photograph is more effective than oral description.* The articulate or eloquent witness has that same advantage over one less vocally endowed, but his testimony is not thereby rendered inadmissible." (emphasis supplied)
>
> *State v. Ebelsheiser,* 242 Iowa 49, 43 N.W. (2d) 706, 19 A.L.R. (2d) 865 (1950).
>
> *"Clinical photographs are not rendered inadmissible by the fact that they portray injuries more strikingly than oral testimony;* for the jury is entitled to know the true condition of the plaintiff, and when this can be shown more accurately by photographs than by oral testimony

of doctors or others, the photographs are competent evidence. This being the case, even gruesome photographs of injuries are admissible when relevant and material, for if they show facts the jury should know, the fact that such conditions may awaken sympathy in the minds of the jury does not render the pictures incompetent." (emphasis supplied)

18 Mountain Law Review (April 1946), pages 212 and 213;
Harris v. Snider, 223 Ala. 94, 134 S. 807;
Green v. Denver, 111 Colo. 390, 142 Pac. 2d 277;
State v. Long, 195 Or. 81, 244 Pac. 2d 1033;
Kauffman v. Meyberg, 140 Pac. 2d 210 (California)—infra-red;
State v. Cunningham, 173 Or. 25, 144 Pac. 2d 303—infra-red.

Enlarged pictures are admissible in evidence.

Wesley v. State, 26 S. 2d 413 (Alabama);
Sim v. Weeks, 45 Pac. 2d 350 (California);
Sack v. Sickman, 23 N.W. 2d 706 (Nebraska);
Also see. *Modern Trials,* Belli, and Medical Photography as a Boon to Trial Lawyers—Averbach (Medical Trial Technique Quarterly, Dec. 1954).

CONCLUSION

In conclusion we submit that under the evidence it was established, even as a matter of law, that Stintzi, in crossing Track 13, was acting by virtue of an implied invitation established by continuous usage of the common dumping ground north of Track 13 over a period of 10 to 26 years, and by appellant's acquiescence in such practice. In any event, viewed in the

light of the evidence most favorable to appellee, the question of Stintzi's status as an invitee, the question of appellant's primary negligence in failing to take any precaution to warn or protect the Addison-Miller employees who appellant knew, or should have known, would be endangered by the drifting of cars down Track 13, and the question of any contributory negligence on the part of Stintzi under the circumstances existing, were all questions clearly within the province of the jury to determine.

The jurors in this case were a typical cross-section of business men, farmers and average wage earners. No contention is made of some failure or defect in that respect. The Court's instructions were eminently fair, and in one respect, i.e. the status of Stintzi, the Court instructed the jury exactly as appellant requested.

On the facts and authorities detailed and cited herein, we respectfully submit that the judgment of the District Court should be in all respects affirmed.

Respectfully submitted,

R. MAX ETTER,
706 Spokane & Eastern Building
Spokane, Washington

JOHN D. MAC GILLIVRAY,
507 Fidelity Building
Spokane, Washington

JOHN T. DAY,
1302 Rochefontaine
Richland, Washington

Attorneys for Plaintiff-Appellee.